IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STILLWATER CONDOMINIUM ASSOCIATION,

Appellant,

vs.

AMERICAN HOME INSURANCE COMPANY, and FIREMAN'S FUND INSURANCE COMPANY,

Appellees.

No. 81-3207

D.C.No.CV-79-50-BU

MEMORANDUM

FILED
August 6, 1982

Appeal from the United States District Court
for the District of Montana
W.D. Murray, Senior District Judge, Presiding
Argued and Submitted June 7, 1982

Before: CHOY, TANG and BOOCHEVER, Circuit Judges.

Stillwater Condominium Association appeals from summary judgment in favor of American Home Assurance Company. The first issue is whether the district court erred in concluding that policy exclusions (l) and (m) excluded the appellant's losses. Stillwater contends that exclusions (l) and (m) are ambiguous if read together with exclusion (a), and that the district court was obliged to resolve this ambiguity in favor of coverage. The district court ruled that,

under Montana law, insurance policy exclusions cannot create coverage and that exclusion (a)'s language therefore did not expand the meaning of exclusions (l) and (m).

We review a district court's interpretation of contract language de novo if the district court relies on state law which offers only "general guidance." Insurance Co. of North America v. Howard, No. 80-3425, slip op. at 2419 (9th Cir. June 7, 1982). While no Montana state court has addressed whether insurance policy exclusions may be construed to create coverage, a substantial majority of the courts that have examined policy exclusions similar to exclusions (l) and (m) have denied coverage on substantially the same grounds as cited by the district court.[1/] The reasons offered by the district court persuade us that the district court was correct in anticipating that the Montana Supreme Court would follow this majority rule.

Stillwater also argues that the conflict between the courts in interpreting these exclusions is by itself sufficient to compel a finding of ambiguity. The district court disagreed, ruling that under Montana law such conflict does not conclusively demonstrate ambiguity. No Montana court has reached this issue. We acknowledge that several courts in other jurisdictions have ruled that split judicial authority establishes ambiguity per se.[2/] The prevailing view, however, is that such conflict is only evidence of ambiguity or is irrelevant.[3/] Absent contrary Montana state court authority, we agree with the district court's reasoning and conclude that the Montana Supreme Court would follow this majority rule.

Stillwater next claims that even if the district court's interpretation of the exclusions is upheld, the duty to defend was breached because Stillwater's action claimed damages not controlled by the exclusions. We disagree. Under Montana law, courts look

to the allegations in the complaint to determine whether an accident is covered and whether there is a duty to defend. See, e.g., State Farm Mutual Insurance Co. v. Leary, 544 P.2d 444, 448 (Mont.1975); Atcheson v. Safeco Insurance Co., 527 P.2d 549, 552 (Mont.1974). Aside from defects in the condominium structures, the only harm alleged in Stillwater's complaints is the loss of rental value. Conceptually, this is only another aspect of the defect in the product. Stillwater cites no authority and offers no argument suggesting otherwise. Thus, liability is excluded under exclusions (l) and (m).

Stillwater also relies upon a deposition in which there is an isolated reference to water damage to one of the condominium owner's furniture. As this damage was not alleged in either of Stillwater's complaints, the district court was not required to consider this allegation in deciding the coverage issue.

AFFIRMED.

FOOTNOTES

1/ See Biebel Bros., Inc. v. U.S. Fidelity & Guarantee Co., 522 F.2d 1207, 1209-12 (8th Cir.1975) (Missouri law); United States Fire Insurance Co. v. Colver, 600 P.2d 1, 3-4 (Alaska 1979); St. Paul Fire & Marine Insurance Co. v. Coss, 80 Cal.App.3d 888, 895-96, 145 Cal.Rptr. 836, 839-41 (1978); LaMarche v. Shelby Mutual Insurance Co., 390 So.2d 325, 326 (Fla.1980); Indiana Insurance Co. v. DeZutti, 408 N.E.2d 1275, 1278-79 (Ind. 1980); Tiano v. Aetna Casualty & Surety Co., 102 Mich.App. 177, ____, 301 N.W.2d 476, 478-80 (1980); Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, ____, 405 A.2d 788, 791-96 (1979); Haugan v. Home Indemnity Co., 86 S.D. 406, ____, 197 N.W.2d 18, 20-22 (1972); Vernon Williams & Son v. Continental Insurance Co., 51 S.W.2d 760, 762-64 (Tenn.1979). But see Federal Insurance Co., v. P.A.T. Homes, Inc., 113 Ariz. 136, 139, 547 P.2d 1050, 1052-53 (1976); Fresard v. Michigan Millers Mutual Insurance Co., 97 Mich.App. 584, ____, 296 N.W.2d 112, 113-15 (1980); Commercial Union Assurance Co. v. Gollan, 118 N.H.744, ____, 394 A.2d 839, 841-42 (N.H. 1978); AID Insurance Service, Inc. v. Geiger, 294 N.W.2d 411, 413-15 (N.D.1980).

2/ See Alliance Life Insurance Co. v. Ulysses Volunteer Fire Relief Ass'n, 215 Kan.937, ____, 529 P.2d 171, 180 (1974); Alvis v. Mutual Benefit Health & Accident Ass'n, 201 Tenn. 198, ____, 297 S.W.2d 643, 645-46 (1956). A different Montana federal district judge has apparently also endorsed this view. See Walker v. Fireman's Fund Insurance Co., 268 F.Supp. 899, 901 (D.Mont.1967). As Walker is a federal and not a state court decision,

the court below was not bound by its ruling and it does not affect our standard of review in this case.

3/ See Trinity Universal Insurance Co. v. Robert P. Stapp, Inc., 278 Ala.209, ____, 177 So.2d 102, 105 (Ala.1963); Crim v. National Life & Accident Insurance Co., 605 S.W.2d 73, 77 (Mo.1980); Breed v. Insurance Co. of North America, 46 N.Y.2d 351, 355, 385 N.E.2d 1280, 1283, 413 N.Y.S.2d 352, 355-56 (1978); Jones v. Insurance Co. of North America, 264 Or.276, ____, 504 P.2d 130, 133 (1972). Several Arizona decisions also support this proposition, but contrary Arizona authority exists. Compare Manning v. Summit Home Insurance Co., 128 Ariz. 79, 81-82, 623 P.2d 1235, 1237 (Ct.App.1980) (no per se rule) and Hampton v. Allstate Insurance Co., 126 Ariz. 403, 405, 616 P.2d 78, 80 (Ct.App.1980) (same) with Federal Insurance Co. v. P.A.T. Homes, Inc., 113 Ariz. 136, 138-39, 547 P.2d 1050, 1052-53 (1976) (apparently endorsing per se standard).

AFFIRMED.

FOOTNOTES

1/ See Biebel Bros., Inc. v. U.S. Fidelity & Guarantee Co., 522 F.2d 1207, 1209-12 (8th Cir.1975) (Missouri law); United States Fire Insurance Co. v. Colver, 600 P.2d 1, 3-4 (Alaska 1979); St. Paul Fire & Marine Insurance Co. v. Coss, 80 Cal.App.3d 888, 895-96, 145 Cal.Rptr. 836, 839-41 (1978); LaMarche v. Shelby Mutual Insurance Co., 390 So.2d 325, 326 (Fla.1980); Indiana Insurance Co. v. DeZutti, 408 N.E.2d 1275, 1278-79 (Ind. 1980); Tiano v. Aetna Casualty & Surety Co., 102 Mich.App. 177, ____, 301 N.W.2d 476, 478-80 (1980); Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, ____, 405 A.2d 788, 791-96 (1979); Haugan v. Home Indemnity Co., 86 S.D. 406, ____, 197 N.W.2d 18, 20-22 (1972); Vernon Williams & Son v. Continental Insurance Co., 51 S.W.2d 760, 762-64 (Tenn.1979). But see Federal Insurance Co., v. P.A.T. Homes, Inc., 113 Ariz. 136, 139, 547 P.2d 1050, 1052-53 (1976); Fresard v. Michigan Millers Mutual Insurance Co., 97 Mich.App. 584, ____, 296 N.W.2d 112, 113-15 (1980); Commercial Union Assurance Co. v. Gollan, 118 N.H.744, ____, 394 A.2d 839, 841-42 (N.H. 1978); AID Insurance Service, Inc. v. Geiger, 294 N.W.2d 411, 413-15 (N.D.1980).

2/ See Alliance Life Insurance Co. v. Ulysses Volunteer Fire Relief Ass'n, 215 Kan.937, ____, 529 P.2d 171, 180 (1974); Alvis v. Mutual Benefit Health & Accident Ass'n, 201 Tenn. 198, ____, 297 S.W.2d 643, 645-46 (1956). A different Montana federal district judge has apparently also endorsed this view. See Walker v. Fireman's Fund Insurance Co., 268 F.Supp. 899, 901 (D.Mont.1967). As Walker is a federal and not a state court decision,

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

STILLWATER CONDOMINIUM ASSOCIATION, No. CV-79-50-Bu

Plaintiff,

vs.

AMERICAN HOME ASSURANCE COMPANY, a New York corporation; and FIREMAN'S FUND INSURANCE COMPANY, a California corporation,

Defendants.

MEMORANDUM AND ORDER

This diversity action is for declaratory judgment to determine the rights of the parties under a comprehensive general liability (CGL) insurance policy and an umbrella liability policy. Land developer Big Sky of Montana, Inc. (Big Sky), purchased the CGL policy from American Home Assurance Company (American Home) and the umbrella liability policy from Fireman's Fund Insurance Company. The damages which plaintiff contends are covered by the liability policies arise out of a civil action in a Montana district court (the Stillwater action).

The facts of the Stillwater action are as follows. Big Sky built and marketed the Stillwater condominiums in the highly scenic Big Sky Resort area. The purchasers of the condominiums, as the Stillwater Condominium Association, brought suit against Big Sky to recover damages for faulty workmanship because the condominiums were poorly constructed. Just a few of the indicia of that poor construction were leaking roofs, delaminating siding, and improperly installed wiring and plumbing.

Big Sky tendered defense of the Stillwater action to American Home. American Home refused to defend, contending that a CGL policy does not provide coverage for the allegations of the Stillwater action. That action ultimately settled, and the Stillwater Condominium Association acquired through that settlement "[a]ll rights, title, and interest in any and all insurance policies procured by Big Sky of Montana, Inc., which would or could provide insurance coverage for the damages

alleged...." This court must determine whether American Home had a duty to defend.

In the Stillwater action the Stillwater Condominium Association alleged breach of express warranty, breach of implied warranty, breach of contract, strict liability in tort, and negligence. Under Montana law an insurer has a duty to defend if the complaint alleges facts, which if proven, would result in coverage. Atcheson v. Safeco Ins. Co., 527 P.2d 549, 552 (Mt.1974). The facts alleged in the Stillwater action constitute faulty workmanship. The damages sought there are for repair or replacement or that faulty workmanship, i.e. repair of the condominiums themselves. Whether those damages are covered by the CGL policy controls whether American Home had a duty to defend in the Stillwater action.

Whether a CGL policy covers an insured's failure to perform in a workmanlike manner, where as here the faulty work product constitutes the basis for damages, has split those jurisdictions which have resolved the

issue. The majority find no coverage and no duty to defend under facts analogous to those in the instant case.[1] This court joins that majority in so holding based upon the following discussion.

The pertinent policy language in the American Home policy is:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of
>
> A. bodily injury or
>
> B. property damage
>
> to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations in the suit are goundless, false or fraudulent, and may make such investigation and settlement of any claim or suit it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgment or settlements. (emphasis added)
>
> EXCLUSIONS
>
> This insurance does not apply:
>
> (a) to liability assumed by the insured

> under any contract or agreement except an incidental contract; but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner; (emphasis added)...
>
> (l) to property damage to the named insured's products arising out of such products or any part of such products;
>
> (m) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith; ....

Plaintiff urges that the exception to exclusion (a), "but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner;" should be construed to grant coverage for the occurrences alleged in the Stillwater action. In the alternative plaintiff argues that the exception to exclusion (a), when read in conjunction with exclusions (l) and (m), creates an ambiguity in the contract which must be construed in favor of coverage.

I. Whether the exception to exclusion (a) grants coverage for repair of faulty work products.

Plaintiff relies upon Applegren v. Milbank Mutual Ins. Co., 268 N.W.2d 114 (N.D.1978), in arguing that the exception to exclusion (a) grants coverage for the occurrences of the Stillwater action. Focusing on exclusion (a), and emphasizing the language, "this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner," Id. at 116, the Applegren court simply held that the exception to exclusion (a) "clearly means that the policy covered and applied to the insured's warranties that the work would be performed in a workmanlike manner." Id. at 118. Applegren, however, stands alone in finding coverage based only on the language in the exception to exclusion (a).[2/]

Further, plaintiff's argument is unpersuasive because it overlooks the "all-

risk" nature of the CGL policy. All-risk means that all insurable, fortuitous events resulting in legal liability to the insured are covered, save those occurrences specifically excluded in the policy. The occurrences of the Stillwater action, therefore, would be covered by the CGL policy if that policy contained no applicable exclusions. That policy does contain applicable exclusions however; at issue here are exclusions (a), (l), and (m). Exclusion (a) excludes from the broad all-risk coverage, "liability assumed by the insured under any contract or agreement except an incidental contract." The exclusion goes on, in the exception to exclusion (a), to bring back within the all-risk coverage, i.e. within the insuring provision, "a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner." Were there no other exclusions to operate on the broad coverage of the insuring provision, the

allegations of the Stillwater action, if proven, would be covered and American Home would have had a duty to defend. There are additional exclusions, however, which further limit the insuring provision, specifically exclusions (l) and (m). Plaintiff would have the court ignore exclusions (l) and (m) and hold that coverage is granted simply by the exception to exclusion (a). The court, however, cannot ignore exclusions (l) and (m) which uniformly have been held straightfoward and unambiguous in eliminating coverage for repair or replacement of the insured's own faulty work. E.g., Weedo v. Stone-E-Brick, Inc., 405 A.2d 788, 794 (N.J.1979), (citations omitted); Haugan v. Home Indemnity Company, 197 N.W.2d 18, 22 (S.D.1972) (citations omitted).

II. Whether exclusions (a), (l) and (m) create an ambiguity which must be resolved in favor of coverage.

The New Hampshire Supreme Court in Commercian Union Assur. Co. v. Gollan, 394 A.2d 839 (N.H.1978), found exclusion (a) and

the business risk exclusions ambiguous, and imposed coverage for the insured's liability to rebuild the roof on a home built by the insured after it had collapsed. Basically, the Gollan court embraced the contention made here by plaintiff that exclusion (a) contradicts the business risk exclusions by granting coverage for warranty of fitness, thereby creating an ambiguity which must be resolved in favor of coverage. To reemphasize, however, the exclusion clauses do not grant coverage; exclusions limit the scope of coverage granted in the insuring agreement. E.g., Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (N.J.1979). Each exclusion refers to the hazards insured against in the coverage paragraph, St. Paul Fire & Marine Ins. Co. v. Coss, 80 Cal.App.3d 888, 896, 145 Cal.Rptr. 836, 841 (Cal.Ct.App.1978), and not to the other exclusions; exclusions are to be read "with the insuring agreement, independently of every other exclusion." Weedo, 405 A.2d at 795 (citation omitted).

Further, the Weedo analysis is consistent with the all-risk nature of the CGL policy. To reiterate, the facts alleged in the Stillwater action are within the coverage of the insuring agreement standing alone. The exception to exclusion (a) preserved that coverage and brings it back within the broad all-risk coverage of the insuring agreement. Exclusions (l) and (m), the business risk or work product exclusions, however, remove the occurrences of the Stillwater action from the coverage granted by the insuring provision. The occurrences of the Stillwater action are not covered because the condominiums which are the basis of the damage are "the named insured's products" (exclusion (l)), and "work performed by or on behalf of the named insured" (exclusion (m)).

Additionally, the language "to which this insurance applies" provides notice that some occurrences resulting in damage simply are not covered. Thereafter, each exclusion further defines and limits the coverage pro-

vided. The faulty workmanship resulting in damages to the Stillwater condominiums, in the general sense may be property damage, but is not as stated in the CGL policy "property damage to which this insurance applies." Moreover, the language used in the exception to exclusion (a) that "this exclusion does not apply to..." provides further notice that other exclusions may and do indeed further limit the coverage granted in the insuring provision.

Plaintiff, however, urges the following analysis. The exception to exclusion (a) "grants" coverage for the occurrences of the Stillwater action. Exclusions (l) and (m) (the business risk exclusions) take away, or are in juxtaposition with, the coverage "granted" in the exception to exclusion (a). Therefore ambiguity arises and coverage results. See, e.g. Commercial Union Assur. Companies v. Gollan, 394 A.2d 839, 842 (N.H. 1978). This analysis, however, is inapposite because the coverage supposedly "granted" by

the exception to exclusion (a) has already been granted in the insuring provision. Having been granted in the insuring provision, that coverage is subject to the limitation of each and every exclusion.

In sum, this court finds no ambiguity in the CGL policy provisions here at issue.

> It is one thing to construe an ambiguity, and it is quite another manner to create one. The terms of the insurance policy should be given a practical and reasonable construction which support (sic) the intent of the parties. The court should not attempt to revise the policy to increase the risk or extend liability just to accomplish a so-called good purpose. Stearns-Roger Corp. v. Hartford Acc. & Indem. Co., 571 P.2d 659, 662 (Ariz.1977) (citations omitted).

The court will not glean the exclusions and apply exceptions where application is not meant or proper just to create an "ambiguity." To read out of the CGL policy the business risk exclusions which uniformly have been held as unambiguous is to give neither a reasonable nor a practical construction to the policy's terms.

III. Whether because jurisdictions disagree as to the ambiguity of exclusions (a), (l) and (m), those exclusions are ambiguous as a matter of law.

Plaintiff relies upon Federal Insurance Company v. P.A.T. Homes, Inc., 547 P.2d 1050, 1052 (Ariz.1976), in arguing that "where various jurisdictions reach different conclusions as to the meaning, intent, and effect of the language of an insurance contract ambiguity is established." The essence of plaintiff's argument is that where courts disagree whether certain language is ambiguous, that language must therefore be ambiguous. Plaintiff's logic is not universally sound. That several jurisdictions disagree as to the meaning of the language might indicate genuine ambiguity. Regarding the instant issue, however "ambiguity" results only from a forced construction of the policy language. There being no genuine ambiguity then, ambiguity as a matter of law is moot.

Additionally, this court wonders even in those cases where legitimate, differing inter-

pretations of the same language result, at what point the language becomes ambiguous as a matter of law. Is that point reached when the jurisdictions are split evenly, when there is a 40%, 30% or 20% minority; or can a court no longer consider the issue for itself when only one other court reaches an opposite conclusion? This court prefers the alternative which allows each court to decide the issue in light of the policy terms and the facts before it.

IV. Conclusion.

For all of these reasons this court will not indulge in a forced construction of the CGL policy just to impose coverage. This court reaches the same conclusion regarding the umbrella liability coverage issued by Fireman's Fund Insurance Company because that policy has the same exclusions as has the American Home CGL policy. Because there is no coverage under these policies, American Home had no duty to defend in the Stillwater action.

THEREFORE, IT IS ORDERED and this does order that defendants' motion for summary judgment is hereby granted.

IT IS FURTHER ORDERED that all other motions before the court are denied.

Done and dated this 3rd day of March, 1981.

/s/ W.D. Murray
W.D. Murray
Senior United States
District Judge.

FOOTNOTES

1/ The four jurisdictions which have found coverage or a duty to defend are Arizona, Michigan, New Hampshire, and North Dakota. See Commercial Union Assur. Companies v. Gollan, 394 A.2d 839 (N.H.1978); Applegren v. Milbank Mut. Ins. Co., 268 N.W.2d 114 (N.D. 1978); Federal Insurance Company v. P.A.T. Homes, Inc., 547 P.2d 1050 (Ariz.1976); Fresard v. Michigan Millers Mut. Ins. Co., 296 N.W.2d 112 (Mich.Ct.App.1980), appeal docketed, No. 46110 (Mich.S.Ct. May 29, 1980).

The eight jurisdictions which have found no coverage and no duty to defend are Alaska, California, Florida, Indiana, Missouri, New Jersey, South Dakota and Tennesse. See Biebel Bros., Inc. v. United States Fidelity & G. Co., 522 F.2d 1207 (8th Cir.1975) (construing Missouri law); Indiana Ins. Co. v. DeZutti, 408 N.E.2d 1275 (Ind.1980); Shelby

Mutual Insurance Company v. LaMarche, 371 So. 2d 198 (Fla.Ct.App.1979), aff'd. No. 57,094, slip op. (Fla.S.Ct. July 10, 1980); Vernon Williams & Son v. Continental Ins. Co., 591 S.W.2d 760 (Tenn.1979); U.S. Fire Ins. Co. v. Colver, 600 P.2d 1 (Alaska 1979); Weedo v. Stone-E-Brick, Inc., 405 A.2d 788 (N.J. 1979); St. Paul Fire & Marine Ins. Co. v. Coss, 80 Cal.App.3d 888, 145 Cal.Rptr. 836 (Cal.Ct.App.1978); Haugan v. Home Indemnity Company, 197 N.W.2d 18 (S.D.1972).

2/ "We conclude that under paragraph (a) of the policy set out earlier herein, Milbank was obligated to defend. The amended complaint clearly stated allegations which come within the terms of paragraph (a) of the insurance policy. We reach this conclusion without taking into consideration any of the provisions of paragraph (k), which we believe are ambiguous." Id. at 119. (emphasis added)

UNITED STATES DISTRICT COURT
for the
DISTRICT OF MONTANA - BUTTE DIVISION

STILLWATER CONDOMINIUM ASSOCIATION, No. CV-79-50-BU

Plaintiff,

vs.

AMERICAN HOME ASSURANCE COMPANY, a New York corporation; and FIREMAN'S FUND INSURANCE COMPANY, a California corporation,

Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable W. D. Murray, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that defendants' motion for summary judgment is granted, and judgment is entered in favor of the defendants.

IT IS FURTHER ORDERED that all other motions before the court are denied.

Dated at Butte, Montana, this 6th day

March, 1981.

Lou Aleksich, Jr.
Clerk of Court

By Doreen F. Hugo,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STILLWATER CONDOMINIUM ASSOCIATION,

Appellant,

vs.

AMERICAN HOME INSURANCE COMPANY, and FIREMAN'S FUND INSURANCE COMPANY,

Appellees.

No. 81-3207

ORDER

Before: CHOY, TANG and BOOCHEVER, Circuit Judges.

The court has considered the appellant's Petition for Rehearing. The Petition for Rehearing is denied.

FILED: October 21, 1982

Phillip B. Winberry, Clerk
United States Court of Appeals

Comprehensive General Liability Insurance—Perspective and Overview

GEORGE H. TINKER*

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* Associate General Counsel, Kemper Insurance Companies, Long Grove, Illinois.

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